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No. 83-1498

In the Supreme Court of the United States

OCTOBER TERM, 1983

BLACK CITIZENS FOR A FAIR MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission abused its discretion in adopting a simplified renewal system for licenses for radio and television broadcasting stations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 719 F.2d 407. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 65a-160a) is reported at 46 Fed. Reg. 26236 (1981).

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1983 (Pet. App. 63a). Rehearing was denied on December 12, 1983 (Pet. App. 60a-61a). The petition for a writ of certiorari was filed on March 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the decision of the Federal Communications Commission to simplify the application that all radio and television broadcast stations must submit to

the Commission in order to have their licenses renewed, and to modify related license renewal procedures.

Section 308(a) of the Communications Act of 1934, 47 U.S.C. 308(a), provides that the Commission may grant license renewals "only upon written application therefor * * *."[1] Section 308(b), 47 U.S.C. 308(b), grants the Commission broad discretion to specify the content of applications, including renewal applications.[2] The Commission has revised the broadcast license renewal application forms as experience or circumstances have dictated. It has added questions reflecting the implementation of new or modified policies, and it has eliminated questions as its policies or regulatory needs have changed.[3]

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[1]The license term is now five years for television broadcast stations and seven years for radio broadcast stations. See Pub. L. No. 97-259, § 112, 96 Stat. 1093; 47 C.F.R. 73.1020.

[2]That section provides in relevant part that applications for station licenses and renewals "shall set forth such facts as the Commission by regulation may prescribe as to the * * * qualifications of the applicant to operate the station; the ownership and location of the proposed station * * *; the frequencies and the power desired to be used; the hours * * * during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require". The Commission is also authorized to require the licensee to provide additional information at any time during the term of the license.

[3]See, *e.g.*, *Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314 and 315*, 5 F.C.C.2d 175 (1966); *Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses*, 27 F.C.C.2d 697 (1971); *Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses*, 44 F.C.C.2d 405 (1973); *Revision of FCC Form 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto*, 52 F.C.C.2d 184 (1975); *Revision of FCC Form 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto*, 59 F.C.C.2d 750 (1976).

Although it had been seeking since 1971 to reduce the complexity of its renewal application forms and procedures, the Commission concluded in 1980 that the process remained a complex and burdensome undertaking for both licensees and the agency (Pet. App. 68a-70a). In July 1980 the Commission thus began a rule making proceeding "to determine whether the public interest would be served by a revamping of our broadcast renewal application procedures." *Revision of Application for Renewal of License*, 45 Fed. Reg. 47444 (1980) (C.A. App. 47). The Commission observed that its experience had demonstrated that most licensees had met or exceeded the Commission's operating guidelines. In addition, the Commission pointed out (C.A. App. 48) that in the case of the relatively few licensees whose performance had been deficient, public participation, rather than agency scrutiny of the renewal application form itself, had been the best vehicle for calling these licensees to account before the Commission. Based on these considerations, the Commission questioned whether there was a "need to continue the in-depth renewal filings now required, believing that our enforcement role may be better discharged and made more meaningful through taking a 'hard look' at random samplings of license renewal applications." The Commission emphasized (C.A. App. 49) that it was not proposing to alter the substantive standards for obtaining renewals, or to change the agency's method of evaluating citizens' complaints and petitions to deny. It proposed simply to modify the renewal application itself and to make congruent changes in the procedures for ensuring licensee compliance with the public interest standard. Pet. App. 67a, 82a-84a.

Following a period for public comment, the Commission in May 1981 adopted a Report and Order (Pet. App. 65a) which consisted essentially of the proposal made in the June 1980 notice. The Commission's revised renewal procedures are made up of the following basic components:

(1) *The Simplified Renewal Application.* The revised application form (Pet. App. 122a) requires the submission of information concerning the applicant's compliance with statutory provisions and Commission regulations and policies in four areas: equal employment opportunity; alien ownership or control of broadcast stations; matters affecting the applicant's character qualifications; and the applicant's maintenance of a required public file at its station containing certain specified information. Pet. App. 73a-75a, 79a-85a.

(2) *The Long Form Audit.* At least five percent of all television stations and noncommercial radio stations[4] will be required to file an audit form — the so-called "long form audit" — that will provide the Commission with essentially the same information as the old renewal forms.[5] The audit procedure is intended to permit the Commission to take a

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[4]In a separate proceeding, the Commission had eliminated for commercial radio stations many of the requirements that continued to be applicable to all television stations and noncommercial radio stations. See *Deregulation of Radio*, 84 F.C.C.2d 968, reconsid. denied, 87 F.C.C.2d 797 (1981), aff'd in part and remanded in part, *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983) 49 Fed. Reg. 19019 (1984). The Commission decided not to subject commercial radio stations to the long form audit because that would "undo the philosophy and impact of [the radio deregulation] proceeding" (Pet. App. 85a). There are presently pending before the FCC two rule making proceedings that propose to adopt for commercial television and noncommercial television and radio stations policies similar to those adopted in the radio deregulation proceeding. See *Commercial TV Stations*, 94 F.C.C.2d 678 (1983); *Public Radio and TV Programming*, 87 F.C.C.2d 716 (1981).

[5]A long form audit application form is reproduced at Pet. App. 123a-155a. The form requires a licensee to explain how it has ascertained the needs and interests of its community and to describe the programming service it has provided, including amounts of nonentertainment programming, children's programming, commercial matter, and public service announcements.

"hard look" at a random sample of renewal applications, "rather than continue the more casual and often uninformative look at the sea of paper flowing into Washington with each renewal cycle." C.A. App. 48, 64. The Commission concluded that a five percent probability of being audited (along with the separate field inspections discussed below) would be "sufficient inducement" for licensees to comply with the agency's rules and policies and would provide "independent assurance" of such compliance. Pet. App. 84a, 88a.

(3) *The Public File Requirement.* The Commission's revised procedures continue to rely on public participation in the renewal process. Accordingly, licensees must maintain relevant information about their operations in their local public inspection file. The Commission concluded that "the information necessary to conduct an in-depth review of a licensee's performance will be available at the station in the public inspection file. Interested citizens need only visit that file to avail themselves of the information necessary to support a complaint or petition to deny, should one be appropriate" (Pet. App. 81a).[6]

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[6]Stations are required to maintain in their local file available for public inspection: annual and quarterly listings of problems and needs facing the community and illustrative programming that the station has presented in response; comments and suggestions received from the public concerning the station's operations; composite weekly program logs; copies of all major applications that the station has filed with the Commission; ownership reports and related documents; requests for political broadcast time with notations regarding disposition of such requests; materials relating to the station's ascertainment of community problems and needs; the station's current promises concerning the presentation of news, public affairs and other non-entertainment programming; copies of annual employment reports; a copy of the *Broadcast Procedure Manual*, which details the "formal and informal ways for members of the community to convey their grievances to the Commission and to participate in proceedings in which the performance of a

(4) *Field Audits and Inspections.* The Commission also announced procedures for additional audits and inspections by its staff. The local offices of the Commission's Field Operations Bureau (F.O.B.) monitor licensee compliance with the Commission's technical rules by conducting random field inspections and engineering measurements, and by investigating specific complaints. Under the simplified renewal scheme, the F.O.B. makes random field inspections of the technical operations and public files of ten percent of all broadcast licensees subject to license renewal each year. Pet. App. 90a-93a, 155a-158a.

In addition, the Commission stated that its Mass Media Bureau (formerly the Broadcast Bureau) might inspect any licensee submitting a renewal application or long form audit that raises particular concerns, as well as other licensees on a random basis. Pet. App. 93a-95a.

2. Petitions to review the Commission's decision to implement the revised renewal system were filed in the United States Court of Appeals for the District of Columbia Circuit. Petitioners challenged the decision to omit program related questions from the short form renewal application. The court of appeals upheld the Commission's order. It found that the Communications Act (47 USC 307(c), 308(b), 309(a)), read in light of its legislative history, did not require the inclusion of such questions in renewal application forms (Pet. App. 9a-10a).[7] The court also relied

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station is judged and legitimate grievances are redressed" (49 F.C.C.2d 1, 2 (1974)). 47 C.F.R. 73.3526, 73.3527. The particular requirements vary between television and radio stations and between commercial and noncommercial stations.

[7]The court recognized (Pet. App. 8a-9a) that it was not confronted with any attempt by the Commission either to change the requirement that a licensee broadcast programming that serves the public interest, or to disavow its responsibility to make an affirmative public interest finding before granting license renewal.

on the longstanding Commission practice of making appropriate amendments in the renewal forms (Pet. App. 10a),[8] and this Court's recognition of the Commission's broad discretion in defining the public interest and determining the most appropriate procedures to protect that interest (Pet. App. 11a-12a, citing *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981)).

The court noted (Pet. App. 12a) that the "crux of petitioners' complaint" is that under the simplified renewal system the Commission will not have sufficient information to make the public interest determination required before an application may be granted. The court disagreed, finding that the new renewal procedures continue to provide "several sources of information (direct and indirect) on the basis of which the Commission will make its renewal decision" (Pet. App. 13a). In particular, the court cited (Pet. App. 13a-14a) the fact that "the FCC will have the input of the public [which] is in many ways the most critical information * * *. [Moreover, in light of the history of active public participation in Commission licensing proceedings] public silence supports an inference that a licensee has been complying with FCC policies [,] * * * a factor which the FCC may weigh in making a 'public interest' determination."

The court added that "[n]either the statute nor the legislative history precludes the Commission from inferring service in the public interest by existing licensees, given that the inference is rebuttable and the regulatory environment provides strong incentives for operation in the public interest"

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[8]The court further observed (Pet. App. 11a) that "the Commission frequently decides to monitor and enforce certain aspects of a licensee's performance — *e.g.*, compliance with the fairness doctrine — on an ad hoc basis rather than at the time for license renewal" citing *National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095, 1115-1116 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978).

(Pet. App. 17a-18a). The court finally found (Pet. App. 22a-23a & n.29) that the Commission had acted well within its "substantial discretion"; the agency's "considerable expertise and experience" in working with renewal applications over many years, "which is fully documented in the record, provides a reasoned and rational basis for the decision."[9]

ARGUMENT

This case involves only the question whether the Federal Communications Commission is required to include programming-related questions in the standard license renewal application form. The decision of the court of appeals that there is no such requirement is correct and does not conflict with any decision of this Court or of any other court of appeals.

1. This Court has consistently emphasized that Congress granted the Commission broad discretion in determining how best to achieve the goal of the Communications Act of 1934 "to secure the maximum benefits of radio to all the people of the United States" *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (quoting *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217 (1943)).[10]

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[9]The court also observed (Pet. App. 19a) that the "simplified renewal application also offers concrete benefits in the form of reduced paperwork and expense." This "reduction in regulatory burden," the court concluded, "is not just a result of FCC impulse, but rather stems directly from the Paperwork Reduction Act [44 U.S.C. (Supp. V) 3501-3520] and congressional policy with respect to the FCC. There can be little doubt that this mandate provides further support for the FCC's decision."

[10]The Court's decisions also establish that deference must be afforded the agency's expert knowledge when it is making predictive judgments about the direction in which the future public interest lies. 450 U.S. at 594. The Court added in *WNCN Listeners Guild* that if the agency's judgment should prove incorrect, it "should stand ready to alter its rule if necessary to serve the public interest more fully." *Id.* at 603. See also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 793-795 (1978).

That discretion includes not only the power to define what the public interest requires, but also to determine the procedures for achieving those public interest goals. In the Court's words:

> Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked * * * were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest.

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); accord, *WNCN Listeners Guild*, 450 U.S. at 600 (the Communications Act generally "does not specify how the Commission should make its public-interest determinations"); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524-525 (1978) (noting longstanding recognition of principle that "formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments," citing *FCC* v. *Schreiber*, 381 U.S. 279, 289-290 (1965)).[11]

Petitioners contend (Pet. App. 13a-15a) that the "obvious purport" of the Communications Act requires the Commission to seek from renewal applicants some level of information regarding the licensee's performance.[12] But as the court

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[11]Section 4(j) of the Communications Act , 47 U.S.C. 154(j), which was relied upon by the Court in *FCC* v. *Schreiber*, provides that "[T]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

[12]Petitioners do not explicitly state what additional information they believe that the Commission must elicit on the application form; they imply that the form must reflect fully the applicant's past performance in presenting local, informational, children's, news and public affairs programming. Pet. 13-15.

of appeals observed (Pet. App. 9a), the Communications Act does not specify that the Commission must seek programming information. Section 308(b) of the Act, 47 U.S.C. 308(b), contains no reference to programming information; moreover, that section underscores the broad discretion accorded to the Commission to select the type of information it believes it must obtain from the applicant when it is processing an application.[13]

The Commission has never regarded the renewal application form as the only source of relevant information for the Commission's licensing and other regulatory functions. In fact broadcasters have been subject over the years to a wide range of requirements and policies, including the fairness doctrine, that the Commission has never enforced by seeking information on its renewal application forms.[14] Rather, it ensures compliance with such obligations by imposing penalties for noncompliance and misrepresentations,[15] by

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[13]Even where a matter is specifically mentioned in Section 308(b), *e.g.*, financial qualifications, the court of appeals has said that the Commission is not required to seek such information if it concludes that it is unnecessary to obtain that information routinely from every applicant. *National Ass'n of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630, 645 (D.C. Cir. 1975), cert. denied, 425 U.S. 992 (1976).

[14]See, *e.g.*, 47 U.S.C. 315(a) and *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); 47 U.S.C. 312(a)(7), 315 and *CBS Inc.* v. *FCC*, 453 U.S. 367 (1981) (political broadcasting); *White Mountain Broadcasting Co.* v. *FCC*, 598 F.2d 274 (D.C. Cir.), cert. denied, 444 U.S. 963 (1979) (billing practices); 47 U.S.C. 317 and *United States* v. *WHAS, Inc.*, 385 F.2d 784 (6th Cir. 1967) (sponsorship identification); *United Broadcasting Co.* v. *FCC*, 565 F.2d 699 (D.C. Cir. 1977), cert. denied, 434 U.S. 1046 (1978) (engineering matters).

[15]See cases cited in note 14 above; see also *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946); *Wadeco, Inc.* v. *FCC*, 628 F.2d 122 (D.C. Cir. 1980); *Las Vegas Valley Broadcasting Co.* v. *FCC*, 589 F.2d 594 (D.C. Cir. 1978), cert. denied, 441 U.S. 931 (1979).

conducting spot checks,[16] and by being alert to citizen complaints.[17] The simplified renewal procedure adopted by the Commission in the proceeding below, which employs these same techniques, is therefore not a dramatic departure from the Commission's longstanding methods for discharging its responsibilities under the Communications Act.[18]

2. Petitioners contend (Pet. 18-20) that even if the statute does not require the comprehensive renewal application form and procedures that they favor, it was nevertheless arbitrary for the Commission to "thrust[] upon the public

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[16]Even under the Commission's former renewal procedures, it did not review a licensee's entire program schedule, but instead used a random sampling technique. Specifically, radio stations had to submit their logs for a seven-day "composite week" only once every three years and television stations submitted composite week logs only once per year. Similarly, the F.O.B. has always enforced the Commission's engineering rules by random inspections and measurements.

[17]The Commission observed below that in its experience the "best vehicle for bringing violations to our attention has been public participation in our processes" (C.A. App. 48). See also *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1003-1005 (D.C. Cir. 1966); *Alianza Federal de Mercedes* v. *FCC*, 539 F.2d 732 (D.C. Cir. 1976). In these cases, public participation, and not the agency's examination of the contents of the renewal applications there involved, led to the Commission's proceedings.

[18]Petitioners emphasize (Pet. 16-17) the court of appeals' prior statements that " 'a licensee runs on his past record' " (quoting *Alianza*) and that " 'in a renewal proceeding past performance is [the Commission's] best criterion.' " (quoting *Office of Communication*). There is no inconsistency between these statements and the court of appeals' conclusion in this case. The obvious proposition that a licensee's past performance in a wide variety of areas is highly relevant in a renewal proceeding—a fact that was undisputed by any party below and clearly was recognized by the Commission in its Report and Order (Pet. App. 8a, 82a-85a)—does not address the distinctly different question of what information the Commission must ask for on renewal application forms.

the primary burden of presenting information on programming at renewal time." There is no merit to this contention.[19]

The Commission's regulatory experience supports its policy of viewing an absence of public complaints about a station's performance as an indication that license renewal is appropriate.[20] As the court of appeals put it (Pet. App.

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[19]Petitioners also incorrectly suggest (Pet. 20) that the Commission's elimination of the requirement that television broadcasters complete an Annual Programming Report presents an issue that warrants review by this Court. The Annual Programming Report was instituted by the Commission in 1973. *Broadcast License Renewals*, 43 F.C.C.2d 1, 79-80 (1973). The Report was nothing more than a compilation of data concerning programming by the station on seven randomly selected days during the preceding twelve months. There is no statutory requirement for such a report. In eliminating it, the Commission explained that it had never used the information from the report in the manner that it envisioned when it adopted the requirement in 1973, and no longer believed it to be necessary. Pet. App. 97a-100a. The television station's program logs for the seven randomly selected days, which contain all the raw data from which the report was compiled, are required to be maintained in the station's public inspection files. Pet. App. 99a-100a. Compiling the data previously available in the report from the program logs in the public file is not a difficult or burdensome task for interested parties. Moreover, the Commission requires that a considerable amount of other information regarding the station's programming be available in the station's public files (see *supra*, note 6; 47 C.F.R. 73.3526, 73.3527); other information is readily available in newspapers and magazines, and simply by monitoring the station.

[20]The public has not been reticent about complaining of broadcasters' programming performance. For example, during the twelve-month period from November 1980 through October 1981, the Commission received approximately 3000 programming-related complaints *per month*, not including organized write-in campaigns. See Gov't C.A. Br. 22 n.25. The court of appeals mistakenly referred to this figure as 3000 complaints during the entire year. Pet. App. 14a n.16.

Programming is the area of a broadcast station's operation most readily available to the public. The Commission will have before it in the simplified renewal application the licensee's assurance that it is

13a-14a), "public silence supports an inference that a licensee has been complying with FCC policies. Such an inference is of course not in any way conclusive; but it is a factor which the FCC may weigh in making a 'public interest' determination."

In sum, the public has for many years played an important role in the Commission's license renewal process.[21] The simplification of that process has neither increased nor diminished that role.

3. Petitioners object (Pet. 18) to the Commission's decision not to require commercial radio licensees to submit the long form audit (see pp. 4-5 & n.4 *supra*), even though all other protections contained in the simplified renewal procedure apply equally to such licensees. Because the audit form would provide information concerning requirements that no longer apply to commercial radio stations, this objection simply seeks to relitigate petitioners' unsuccessful opposition to the Commission's radio deregulation

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maintaining a file for public inspection. The public will therefore have access to a variety of information, including, for example (in the case of commercial radio stations) quarterly lists of programming that the station has offered in response to community issues. See *Deregulation of Radio*, 84 F.C.C. 2d 968, reconsid. denied, 87 F.C.C. 2d 797 (1981), aff'd in part and remanded in part, *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983), on remand, *Deregulation of Radio*, 49 Fed. Reg. 19019 (1984); see also note 6, *supra*.

[21]The Commission's reliance on the public is not only appropriate; it may also be essential. The Commission's limited resources are simply not adequate "to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee" (*Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d at 1005 (Burger, J.)). In any event, "experience demonstrates consumers are generally among the best vindicators of the public interest" (*ibid.*), consistently with "our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life" (*id.* at 1003).

proceeding. That deregulation was substantially upheld by the court of appeals in a separate review proceeding to which petitioners NAACP and Geller were parties; this Court was not asked to review that decision. *Office of Communication of the United Church of Christ* v. *FCC*, *supra*.[22]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[22]Concluding that the Commission had inadequately explained its reasons for eliminating the requirement of program logs, the court remanded that limited aspect of the proceeding for further consideration. 707 F.2d at 1438-1442. In response to the remand, the Commission modified its decision. See note 4, *supra*.